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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

Number 634

MINISTERS LIFE AND CASUALTY UNION,
Appellant,

v.

ROBERT D. HAASE,
Commissioner of Insurance,
and
BRONSON C. LA FOLLETTE,
Attorney General of the State of Wisconsin,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE APPELLANT IN OPPOSITION TO THE APPELLEES' MOTION TO DISMISS

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THE GILMAN PRESS, INC., MADISON, WISCONSIN

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The Appellees' motion to dismiss asks the Court to upset an unbroken constitutional understanding and a long-continued course of business on the ground that no substantial Federal question is involved. The Appellees do not suggest that non-resident insurance companies conducting their affairs as the Appellant does have heretofore been considered to be subject to taxation and regulation in any State, including Wisconsin. The Appelleees point to

no previous case subjecting a mail-order insurance company, doing business as the Appellant does, to State taxation and regulation. The fact that Wisconsin is the first State actively seeking to impose such a tax and regulatory measure shows the depth of the constitutional understanding which would be upset if the decision below is allowed to stand. Such a change in constitutional doctrine clearly presents a substantial Federal question.

As the Appellees state, there is no controversy as to the facts. The decision of the court below did not turn on any disputed questions of fact, and this Court is not asked to review any factual question. The Appellees do endeavor to show that compliance with the Wisconsin statute would not subject the Appellant to any substantial burden. This presentation, however, does not recognize two important factors: (a) If Wisconsin can tax and regulate, all States can tax and regulate, and the aggregate burden on a small company will be very great. This is not something which the company can control, as it must accept renewals from its policyholders wherever they may be when they seek to renew their policies. (b) If Wisconsin can regulate the activities of the Appellant, then the Wisconsin "resident agent" law will be applicable. Sec. 201.44 (1) of the Wisconsin Statutes.[1] This would greatly increase the Appel-

[1] "(1) No policy of insurance shall be solicited, issued or delivered in this state, except through an agent lawfully authorized as to the kind of insurance effected by such policy. Under such regulations and restrictions as is [sic] deemed necessary by the commissioner of insurance, licenses may be issued to nonresident agents, other than persons who represent the insured, who are licensed by the state in which they reside upon payment of . . . . [an annual fee of $10]; but such agents shall not countersign any policy or contract of insurance."

This also explains the interest of the two agency groups (The National Association of Life Underwriters and The Wisconsin Association of Life Underwriters) which filed an **amicus** brief in the court below supporting the Wisconsin statute.

lant's cost of doing business, and would make its business impractical except in metropolitan areas. It is clear, therefore, that the interests at stake here, as well as the constitutional questions, are substantial.

If the decision below stands, a well-recognized and long-continued method of conducting a portion of the insurance business in this country will be gravely affected.

In saying that no substantial Federal question is involved, the Appellees rely primarily on four cases. None of these cases supports the Appellees' conclusion.

(a) In *Osborn v. Ozlin,* 310 U. S. 53 (1940) which was decided before 1945, the Virginia statute involved was, by its terms, applicable only to "Insurance companies, legally authorized to do business in this State . . ." Virginia Code, Sec. 4222(a), quoted in footnote 1, at 310 U. S. 59. As the Court stated at 310 U. S. 60, "The bill was brought by foreign corporations *authorized to do casualty and surety business in Virginia . . .*" (Italics added.) The sole question related to the power of Virginia over a corporation which had "qualified" in Virginia, and had thus chosen to do a local business in Virginia subject to Virginia regulation.

In the present case, Ministers has not qualified in Wisconsin. It has not subjected itself to the general authority of Wisconsin by its voluntary act. Indeed, *Osborn* shows clearly just what Ministers is most concerned about, and why this case does present substantial Federal questions.

(b) The other case decided before 1945 is *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313 (1943). *Hoopeston* presents a situation which is quite different from the facts of this case. In the first place, this Court noted in 318 U. S.

at 315 that: "These reciprocals have been annually licensed to do business in New York since 1930 . . ." Thus, *Hoopeston* involved companies which had qualified to do business in New York. What they were seeking in the proceeding which came to this Court in *Hoopeston* was a declaratory judgment that though they had qualified they would not be subject to certain provisions of the New York statute. In substance, what this Court decided was that where an insurance company qualifies to do business in New York the provisions of New York law applicable to qualified companies were valid as applied to Hoopeston. Obviously this has nothing to do with the question involved here, which is, the extent to which a State may apply its laws to a company which has not qualified in the State, and which conducts its business by mail and without any agents or offices in the State.

Moreover, the facts involved in *Hoopeston* were quite different from those involved here. It was Hoopeston's practice to send one "of a group of insurance engineers . . . to New York to investigate the risk. . . ." 318 U. S. at 317. In addition, as this Court said, "The insurance engineers may visit the subscriber from time to time to encourage the reduction of fire hazards or to investigate the cause and extent of losses, and on such trips the engineer may give information concerning the enterprise to prospective participants, although he does not actively solicit business." 318 U. S. at 317-318. In addition, "The contracts reserved the right of the reciprocals to go into New York to repair, rebuild, or replace lost or damaged property." 318 U. S. at 318.

These facts show that in *Hoopeston* the companies were actively engaged in producing and in carrying out business in New York, through their own agents. There are no similar facts in the present case.

Thus it is clear that there was no decision of this Court prior to the McCarran-Ferguson Act (Act of March 9, 1945, 59 Stat. 33; 15 U. S. C. secs. 1011 et seq.—see pp. 54b-56b of the Jurisdictional Statement) which had upheld the power of a State to regulate or to tax a foreign insurance company, not qualified to do business in the State, and conducting its business on the mail-order basis, without offices or agents in the State. If, as we contend, and as this Court held in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U. S. 451 (1962), the McCarran-Ferguson Act was intended by Congress as a still-stand as far as taxation and regulation are concerned, then there is no basis for the decision below.

(c) *Travellers Health Assn. v. Virginia*, 339 U. S. 643 (1950), is next cited as supporting the jurisdiction of Wisconsin in this case. That case arose on a special appearance to contest the jurisdiction of the Virginia courts over a nonresident mail-order insurance company. This Court held that the State had power "to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants on the Secretary of the Commonwealth." 339 U. S. at 647.

There is no such issue in this case. As stated on page 6 of the Jurisdictional Statement, the Appellant has not drawn into question the provision of the Wisconsin statute providing for service of process on the Commissioner of In-

surance. Such provisions are not within the still-stand of the McCarran-Ferguson Act, as construed in *Todd Shipyards*. The McCarran-Ferguson Act relates by its terms only to "regulation or taxation" by the several states, and has not affected the development of the law with respect to the question of jurisdiction of courts. Sec. 1 of McCarran-Ferguson Act, quoted at p. 54b of the Jurisdictional Statement.

(d) Finally, *Federal Trade Commission v. Travellers Health Assn.*, 362 U. S. 293 (1960), is cited in the motion to dismiss. But this case seems clearly to support the position of the Appellant here. The *Federal Trade Commision* case was cited by this Court in the *Todd Shipyards* opinion as holding that "Congress has posited a regime of state regulation on the continuing validity of specific prior decisions." 370 U. S. at 457. This is our position here. Moreover, the very basis of *Federal Trade Commission* is that the Federal Trade Commission *can* regulate non-resident mail-order insurance companies because this is an appropriate exercise of Federal power over interstate commerce and the non-domiciliary States canot do so effectively for constitutional reasons.[2]

In enacting the McCarran-Ferguson Act, Congress expressly stated that "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the

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[2]In **Federal Trade Commission v. Travellers Health Assn.**, 362 U. S. 293, 297, this Court quoted from its opinion in **Federal Trade Commission v. National Casualty Co.**, 357 U. S. 560, 564 (1958), where it referred to "interstate insurance practices which the States cannot for constitutional reasons regulate effectively."

decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H. R. Rep. No. 143, 79th Congress, 1st Session, p. 3; quoted at p. 13 of the Jurisdictional Statement. The Appellees have pointed to no case in this Court which sustains State authority as broad as that upheld by the Court below. Thus, that decision goes beyond the power which the States "had been held to possess prior to" the *Southeastern Underwriters* decision, and should therefore be held to go beyond the power granted to the States by the McCarran-Ferguson Act.

We have not argued other questions in the Jurisdictional Statement because our purpose there was to show that the basic questions in this case are clearly and directly presented and are substantial.

CONCLUSION

The questions presented are substantial, materially affecting the transaction of a significant segment of the insurance business in this country. The motion to dismiss should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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November, 1966